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BY_____

STATE OF NEW MEXICO
COUNTY OF CIBOLA
IN THE DISTRICT COURT

MICHAEL ARMENDARIZ,
Petitioner,

v.

Case No. D-1314-CR-2002-0470

STANLEY MONTOYA, Warden, and
STATE OF NEW MEXICO,
Respondents.

FINAL
ORDER ON PETITION FOR HABEAS CORPUS
and
MOTION TO DISMISS

This is a final order dismissing Petitioner's Petition for Habeas Corpus, with prejudice. The Court entered a proposed decision on June 13, 2018. All material underlined is new and was added after the hearing of July 19, 2018.

The Court heard all of the matters raised at the July 19, 2018 hearing and allowed Petitioner to present an offer of proof through his attorney and through one witness and permitted the submission of exhibits "A" through "D" by the Defendant. After consideration of the filings by counsel in preparation for the July 19, 2018 hearing, their arguments, and the offer of proof permitted, the Court finds the Petitioner failed to meet his burden to raise any grounds for the granting of habeas corpus relief and therefore summarily denies the Petition and grants the State's Motion to Dismiss. See non-underlined portions of this final order for the reasoning of the Court, which appears next and which non-underlined portions were the proposed decision of the Court. The Court grants the State's requests to change this decision, which two changes are shown by appearing within double parenthesis below. The first change appears at page 8 and the second appears at page 9 below.

This matter came before the Court on Petitioner's Petition for Writ of Habeas Corpus and on Respondent's Motion to Dismiss and Request for Clarification of Certain claims. The Court reviewed the filings of the parties, the arguments of counsel, and the seven volumes of the transcript of the jury trial of Petitioner, said trial having occurred starting on August 4, 2003 and ending on August 12, 2003. Petitioner was found guilty of murder in the first degree and other lesser felonies and was acquitted of some lesser felonies. The verdicts were handed down by the jury on August 12, 2003 on the seventh day of trial. An appeal was duly taken and a decision was issued by the New Mexico Supreme Court and filed on August 3, 2006 (2006-NMSC-036, No. 28,320). Petitioner filed this Petition for a Writ of Habeas Corpus on June 6, 2007.

The Petition is based upon the referenced jury trial which was held in connection with an alleged first degree murder and other crimes committed by Petitioner at the Two Minute Warning

Bar in Los Lunas, New Mexico, on October 5, 2002.

The allegations of the Petition contain many claims of deprivations of rights, the vast majority of which are argumentative, conclusory, or matters that could have been raised before the Supreme Court. The gravamen of the Petition is ineffective assistance of counsel and the use of a video submitted to the jury of the killing by Petitioner of decedent Montano and the shooting of decedent's brother. These claims are defined below. The court proposes to dismiss summarily all claims for lack of evidentiary support after a voluminous record was reviewed by the Court, as well as based on filings and arguments of counsel.

INEFFECTIVE ASSISTANCE OF COUNSEL:

The Court gives one example of a claim made which is unsupported by the evidence. Mr. Armendariz claims his attorney "wrongfully stipulated to an edited and abridged version of a crucial piece of evidence" (see paragraph 3 of the Petition). This is in reference to the video tape of the shootings admitted at the trial. However, defense counsel did not stipulate to its admission. Volume IV, pages 84-87 show defense counsel engaged in a voir dire examination of the witness through whom the video was to be admitted into evidence by the State (Detective Charles Nuanez of the Los Lunas Police Department). After his voir dire examination, defense counsel objected to the admission of the video on the grounds that it was "not an accurate rendition" of the events (Vol. IV, pages 87-88). Defense counsel's objection was overruled and the video from the two-minute warning (State's Exhibit #49) was admitted over his objection–the record is factually the opposite of what Mr. Armendariz claims.

The admission of the video of the shootings over objection could have been raised on the appeal to the Supreme Court. It was not. There is reasoning behind not raising the matter before the Supreme Court, as seen below, which amounts to a defense tactic at trial to minimize the showing of damaging evidence to the jury, rather than a true preservation of error effort. Relief by way of Habeas Corpus is not available and the evidence does not support, and in fact goes directly against the allegations made by Mr. Armendariz about ineffective assistance of counsel. Indeed, a foundation was laid by the State through Detective Nuanes regarding admitting the admission of the tape at pages 85-87 of his testimony at Vol. IV of the record. He stated that while it was a "slowed down" version of the original, it nevertheless was a "replica" of the original and he stated that in the admitted tape you see "exactly what you see in the original" (Vol. IV, page 94) in response to a question by the prosecuting attorney.

VIEWING OF THE ORIGINAL TAPE (SUPPRESSION BY THE STATE):

The State in this Habeas Corpus proceeding also allows for the possibility that the Habeas Corpus claim that the "prosecution failed to provide defense counsel with an opportunity to view the original video recording at the Two Minute warning bar" should not be dismissed. The record does not bear out that this occurred to the extent that the State either suppressed or prevented in some fashion defense counsel from seeing the original tape. Outside of the presence of the jury and just before trial, at Vol. I, pages 14-16 there was an exchange regarding the viewing of the "security tape" or video from the Two Minute Warning bar. Defense counsel was

expressly given the opportunity to view the version of the original that was to be submitted to the jury. Defense counsel stated he had not had a chance to speak to the State's attorney Lopez because Defense counsel was at a trial in another location; defense counsel stated that he was working with the State's attorney to try to stipulate to the "admissibility of the tape" (Vol, I, page 16)–Defense counsel was referring to the version of the tape taken from the original. [the Court notes here that no such stipulation was entered and the tape was admitted over defense objection to the tape–see discussion above] The Defense also stated that he had "a good working relationship with Mr. Lopez. Discovery has been flowing." (Vol, I, page 16) The State's attorney expressly stated that Defense counsel should have the opportunity to see the tape in the version to be admitted before opening statements (Vol, I, page 15). There is clear evidence of cooperation by the State, rather than suppression or hindrance to discovery.

Furthermore, the testimony of Charles Apodaca becomes pertinent regarding the vieweing of the original tape at his bar, as he is the owner of the Two Minute Warning. Mr. Apodaca was called as a Defense witness and he stated that the video could be seen at his bar in "real time" (Vol. V, page 118) and the charge would be $300.00. Mr. Apodaca stated he told the prosecution or the police regarding viewing it at his business place (the Two Minute Warning) but never discussed price with them because "they told me they didn't have the money." (Vol, V, page 119). The above exchange took place in the presence of the jury.

At pages 120-121 on cross-examination Mr. Apodaca stated he would be willing to let them go down to his business and view it for $300.00 but he would not bring it to the courthouse for that amount. No request was made by anyone to view the original at the Two Minute Warning by the jury nor to make some arrangement to bring the equipment to the courthouse. No evidence appears anywhere that the State in any manner hindered the Defense from acquiring the original tape or equipment–no one requested the Court to order it brought to the Courthouse for viewing on the original equipment.

The production of the original would not have made any difference. On re-direct examination of Detective Nuanes by the State (Vol. IV, pages 111-113) evidence was being produced from the Detective that the video, being shown to the jury, showed no "scuffling" immediately prior to the shooting and as the Defendant was pointing the gun. Defense counsel objected by stating that the "tape speaks for itself" (Vol, IV, page 113). The objection was sustained. It is obvious that the frame-by-frame questioning by the State's attorney was devastating to the claim of self defense or defense of another theories of the Defendant and Defense counsel opted successfully to stop this testimony through the admitted video of the Two Minute Warning. The Court considers this a reasonable tactic to stop or interrupt testimony directly bearing on the video tape admitted which was demonstrating that the Defendant was not acting in self defense nor in defense of another.

The jury, during deliberations, saw the video a second time. Defense counsel initially objected unless it was done in open Court, which actually occurred and Defense counsel withdrew the objection and the jury saw the video in open Court during the deliberative phase of the trial (Vol. VI, pages 92-95). Defense counsel's original objection was that the jury had already seen the tape–the defense tactic, feasible at this point, was to minimize damaging

testimony from the video being seen again by the jury on its own over and over. This militates against Mr. Armendariz's claim that the tape would show self-defense or defense of another just prior to and at the time of the shooting and shows reasonable tactics by the defense to minimize the damage being done by the video to the defense.

WITNESSES TO THE SHOOTING AND EVENTS IMMEDIATELY PRIOR and THE VIDEO:

The State presented witnesses which unequivocally stated that Defendant's friend, Mr. Nestor Chavez, was only being properly restrained on the hood of a car by decedent Damacio Montano and his brother Eric Montano and were not beating him but were rather trying to subdue him from continuing to fight. The Defense, one the other hand, presented eyewitness testimony to the effect that decedent and his brother were beating Nestor Chavez in a bad way and choking him to unconsciousness, when Mr. Armandariz went to a car and returned with a gun in his possession and that decedent kept beating Nestor Chavez after being told by Defendant to stop, immediately after which the shooting occurred (which by Defendant's version occurred when decedent Damacio "charged" Defendant after refusing to stop beating Nestor Chavez.

The record and Mr. Armendariz's arguments and evidence fail to demonstrate that a "clearer" version of the video would change the result. The jury saw it twice and the defense objected tactically to avoid destruction of its only defense–self defense or defense of another. It is apparent that Defense counsel concluded that viewing the "original" video by the jury could make things worse for his client and therefore did not pursue that avenue. This left open his ability to argue that the video showed "ghosts" as he did in closing. See Vol. VII at pages 75 and 76 which shows the following closing argument:

> "The surveillience camera is so bad, folks, that the State has to call in an interpreter, because if you look at it, you are not going to be able to tell who's on first and what's on second. . .
>
> They are ghost images. It's impossible to even identify the gender. And you have to really, really trust Lct. Nuanes. And I don't have any reason disbelieve him. I mean, how can I? I'm looking at the same crummy evidence you are. And whose fault is that?"

With a clearer video (if the original is that much clearer), Mr. Armendariz's attorney would have no self-defense argument left based on the record. It is apparent that if the video shown to the jury was in fact clearer, defense counsel would rather not have that seen by the jury and only one reason makes tactical sense–it would weaken or destroy his self-defense or defense of another defenses.

The Petitioner's Response to the State's Motion to Dismiss, at paragraph 12 asks the Court to review the

> "'video' of the shooting **that was shown at trial–a video that, despite its numerous**

deficiencies, shows: [emphasis added by the author]

> (1) that Mr. Armendariz did not want to be involved in the altercation outside the bar;
>
> (2) that his friend Nestor Chavez was enduring a severe beating that could have resulted in his death;
>
> (3) that Petitioner and Sandra Baray searched feverishly for the car keys to drive away frm the scene;
>
> (4) that Sandra handed Petitioner a gun, which he ultimately brandished in the hopes that it would breadk up the fight;
>
> (5) that Petitioner tried to walk away without firing any shots, but was **forced to turn around by the decedent who pointed his own gun at Petitioner**; and [emphasis added by author]
>
> (6) that shots were fired either in self-defense or in defense of another."

Paragraph 13 of the Petition also requests that the court consider this video which shows Petitioner acted in self-defense or in defense of another.

As pointed out elsewhere in this decision, this video was shown to the jury during trial and the jury requested that it be shown a second time, which was done over objection by defense counsel who relented only after the Court agreed to show the video to the jury in open Court and not in the privacy of deliberations. Defense counsel's strategy is clear–to minimize the damage to the self-defense theory of Petitioner and his "defense of another" theory by preventing the jury from seeing the video an unlimited number of times. A "fuzzy" video could have been thought to be better than a "clear" video by defense counsel because it allows him to argue his theories–the Court will not second-guess such a strategy as being as ineffective assistance of counsel since, under the rest of the facts of the case, it could be the best that could be done under the circumstances. See the next section regarding the claim that the video shows another gun–in the Court's opinion defense counsel was absolutely competent in not pursing the theory of another gun due to the very damaging testimony by all witnesses that the only gun at the shooting was the one held by Petitioner himself.

ANOTHER GUN:

Defendant's attorney in Habeas argues there is evidence of another gun being used at the shooting which affects the case. The Court considers this argument without merit, contrary to the facts adduced at trial, and likely to be very damaging to the self-defense and defense of another theories. The eyewitness testimony, if consistent on anything, is consistent on the issue that the only person who had a gun at the shooting was the Defendant. The ballistics witness simply

could not tie some of the casings to the specific gun, but was able to tie no less than six of them to one gun and also tied one bullet taken from decedent's body and one from Eric's (Damacio's surviving brother) body to the same gun. No eyewitness for either side stated there was any other gun.

The Defendant himself met with Dr. Westfried, Ph. D., who wrote a report on 6/10/10. Mr. Armendariz's version of the shooting appears in that report at pages 10 and 11. He stated in part to the examining psychiatrist what he saw regarding decedent Damacio as he shot him:

> "I was tunnel vision for this dude. Kind of like underwater. Didn't know what was going on. I am looking at the dude and watching his moves. * * * With the brutal beating I saw, I knew he was a threat. **Nobody in their right mind wants to fight a gun.** I know he is not all there. . .so we're leaving and need to back up and let everybody in the car. This Eric stands by the driver side door. I told him, 'It's over, say 'se acabo', we are leaving.' I am thinking they are gang people (their behavior), or knuckleheads. We are trying to leave (but they blocked our way). I tell them to move (so I could go). He understands. The guy to the right (Damasio) and he's like a bull. (Described Damasio kicking his feet on the ground and raising his head while arching his back downward). When I saw him do that, I knew this is bad. **If he gets the gun,** he will kill me or Nestor. * * * I turn around. He still doing the bull thing and breaks off and comes straight for me. All I see, like dream, fighting and can't swing, . . . I shot the dude. * * * Hit the left upper chest (of Damasio). Like I'm shooting, gun firing, but not affecting him at all. I am shooting till no longer a threat. * * *I keep shooting while he is running at me . . . I shoot till he goes down. Once he's down, I look at him and look around me. * * * I run. * * *"

In Mr. Armendariz's version of the shooting, there is no gun but the one he is using. No other witness saw another gun, only the one being held by Mr. Armendariz. The evidence is overwhelming and uncontradicted that neither decedent Damacio nor anyone else had a gun as Defendant shot Damacio.

Defendant was told that he only fired two shots and another person at the scene fired another gun (Dr. Westfried report at page 12). Defendant did not believe it and was in "shock and dismay" when told that experts said he only fired two shots. He also did not believe this disclosure made by the legal assistants about Defendant firing two shots as opposed to his belief of seven times. All the witnesses and the ballistics testimony bear out that Mr. Armendariz is correct that the gun was fired many more times than two and was fired at least seven times as he himself believes–Dr. Rebecca Irvine, the pathologist who testified for the State, opined that decedent was shot seven times as she found seven entry wounds (Vol. IV, page 41).

There is not a hint of evidence that a second gun was used. All the evidence is to the contrary and it is impossible to see how it could be overcome. In fact, more than one witness testified that Defendant, earlier in the evening, brandished a gun he had hidden on his person–see the testimony of Monica Padilla at Vol. II, page 186–the gun per this testimony was hidden under Defendant's shirt. Defendant showed the gun to another person by the name of Jeff Medina

inside the bar (Vol. II, page 197).

Romulo Barela stated that inside the bar Defendant showed a gun by picking up his shirt in response to taunts by some correctional officers, saying "east side" as if in reference to some gang (Vol. III, page 22). Cheri Padilla, who testified for Defendant, stated that neither Eric nor decedent Damacio were armed (Vol. V, page 97) and testified she heard "around five, maybe six" shots (Vol. V, page 76). She stated she saw Defendant disappear and "he came back around and he had a gun." (Vol. V, page 74).

It is apparent that there is no point in pursuing the matter of a second gun further. Too many eyewitness accounts place one gun at the scene and it was in the possession of Defendant inside the bar or just prior to the shooting and during the shooting. It is inconceivable that a video tape would show a second gun such that it would be helpful to change a juror's mind about the Defendant's guilt, even assuming the video showed another gun.

It is plausible that defense counsel, knowing in advance what the witnesses knew and what their testimony would indicate, would not want a clearer version of the video shown to the jury. Defense counsel could easily have concluded that the tape shown to the jury, however, much he criticized it, is all he wanted the jury to see. Showing a clearer copy may only show more clearly that there was no second gun and that the shooting was not justified. It may even show Defendant leaving the scene briefly and coming back with the gun used to kill Damacio–this could be construed as strong and confirming evidence of pre-meditation right on the video itself (see testimony of Cheri Padilla, Vol. V, page 74).

MISCELLANEOUS FACTUAL ALLEGATIONS:

1. **Lack of communication** before trial–raised by Petitioner stating there were only two visits with him prior to trial and two telephone calls by his defense attorney. There is nothing shown that this resulted in any ineffective assistance and the Court has sifted through and written about the specific claims of ineffective assistance individually in other parts of the decision.

2. **Tampering with the video**–Petitioner alleges his mother, Diana Crowson, overheard a conversation that she interpreted to mean there was tampering with the video tape because the person working on the video tape for the Los Lunas Police Department said they were "making sure everyone was in the right place at the right time." (Page 2, paragraph 1(B) of the Petition) Nothing in the record supports tampering with the video, nor is there any serious issue raised in this regard by any facts available to the Court.

3. **Edited video**–the record does not bear out "editing" nor an agreement by defense counsel to admit the video as claimed by Petitioner. It went in after a proper foundation was laid and over the objection of defense counsel as detailed elsewhere in this decision. This could have been raised on appeal. Any "editing" claimed does not show in any way that there was ineffective assistance of counsel. (See page 3 of Petition for Writ) There is nothing to support the claim that the "unaltered copy" of the video shows "the friend being choked into unconsciousness"–the eye witness accounts are direct visual accounts and are in direct oppostion

to each other–the State witnesses testified that the "friend" (Nestor Chavez) was the instigator of the altercations and was being simply "subdued" by Damacio and/or Eric to prevent him from hitting them–the Defense witnesses state that the decedent and/or Eric were severely "beating" Nestor Chavez. It is unknown as to how these two directly contradictory accounts can be resolved by either a "grainy" tape or by the "original" which is similar to the "grainy" tape seen by the jury on two separate occasions during the trial. Nothing has been submitted to show that the "original" would probably sway a jury in Defendant's favor and the indications are that Defense counsel was better off with the "grainy" tape in light of his conduct and in light of all the testimony of witnesses believed by the jury.

Vangie Aragon, a Defense witness (see next paragraph), gave testimony to the effect that Eric, Decedent's brother, was just before the shooting trying to "calm" down Nestor, her husband-to-be, and did so by slamming him against the car as he fought Damacio Montano (Vol. V, page 43). This testimony highlights the issue as to whether the video tape, in a parking lot at night, could truly show the difference between a fight, someone being subdued as opposed to being mistreated, and who was actually fighting.

All of the Defense witnesses had patent credibility issues. Charles Apodaca, owner of the Two Minute Warning and eyewitness for the Petitioner, was being sued at the time of trial by the Estate of Damacio Montano as he admitted to the jury (Vol. V, pages 132-133) and was sufficiently disturbed by the lawsuit that he was considering his own lawsuit against the Montanos for creating an inherently dangerous activity at the Two Minute Warning (Vol. V, page 133). Witness Cheri Padilla was convicted of trafficking heroin as revealed to the jury (Vol. V, p. 106). The only other defense witness, Vangie Aragon, was the girlfriend of Nestor Chavez's, had known him for 10-11 years and was at the Two Minute Warning on the date of the shooting to celebrate her engagement to him (Vol. V, page 35).

4. **Testimony by Petitioner**–Petitioner has argued that he would present several witnesses at an evidentiary hearing, but has never stated that he would personally testify. Therefore, he has not identified any evidence which would prove that he wanted to testify and that counsel prevented him from doing so. The court must therefore assume that his trial counsel advised him not to testify, and that he accepted counsel's advice. The trial attorney would have many reasons to have advised against testifying, specifically:

a) a **felon carrying a gun inside of a bar** and brandishing same in the bar–what could possibly be the purpose for such conduct hours before the shooting?

b) **fleeing**–the evidence was uncontradicted that he fled the scene immediately after the shooting. This is not easily reconcilable with a self-defense or defense of another theory he was depending upon for his defense against the first degree murder charge. Why run?

c) **hiding the gun**–his attorney, presumably with Petitioner's consent, told the jury the Petitioner did tamper with evidence by hiding the gun and to find him guilty of tampering with evidence (Vol. V, page 81). While it is unknown whether he would admit that had he testified, certainly Petitioner would have a lot to explain about getting rid of the

weapon he just used to kill another person and try to kill another.

d) **specific intent**–taking concealed weapon into a bar as a felon, pretending he was calm then acquiring a weapon after he as released by Romulo Barela (Vol. III, pages 28-29), acquiring a gun after saying he was "cool" then threatening to shoot a "f . . . . . g pig", firing the gun seven times into decedent, some in the back and some after decedent fell (see Eric Montano testimony, Vol. IV, pages 153-154 and the testimony of Dr. Rebecca Irvine regarding entry wounds through decedent's back at Vol. IV, page 24), fleeing, hiding the gun immediately after the shooting, and eventually being arrested in another state, would be rife with questions as to whether he knew what he was doing (specific intent to kill) and whether what he had done was known by him to be murder so he stayed away until arrested two days later in the State of Colorado.

e) Mr. Armendariz was also a convicted felon and subject to cross-examination–see Vol. IV, pages 77-78; by not testifying, the testimony was limited to witness Nuanes stating that Defendant was simply a convicted felon in the last ten years and was sentenced to prison as a result. The prior charge was **aggravated battery with a deadly weapon** which could be devastating to all of his defenses–the actual crime of aggravated battery with a deadly weapon was not mentioned to the jury, but it might have if he testified.

There are numerous and compelling reasons why it would have been extremely unwise for Mr. Armendariz not to testify. These reasons, compared to the favorable testimony to be given by Mr. Armendariz, override his notion to testify and it appears that it would be ineffective assistance of counsel to advise him to testify under these circumstances.

5. **Prejudicial comments by counsel to Mr. Armendariz and one allegedly sleeping juror**–these allegations have no substance and are not considered to be habeas corpus issues.

6. **Jury Selection**–nothing out of the ordinary occurred here and there is insufficient information to delve into all the details of jury selection to search for possible ineffective assistance of counsel.

7. **Failure to give "a complete or legible copy"** of discovery by counsel to Petitioner–this borders on a total waste of time and will not be considered as habeas material.

8. **Failure to investigate**–Petitioner complains that "rumors" about witness conduct should have been investigated–this is totally within the judgment of the attorney given limited funds and time. He complains that the medical records of Mr. Eric Montano should have been acquired to get a blood-alcohol content–there was ample evidence of everyone's drinking, including Eric Montano's–see Vol. IV at page 123 indicating that Eric Montano "opened up a tab" on his credit card, ordered bottled beer and ordered a pitcher of beer later (page 125). He arrived at 10:30 -11:00 p.m. Eric Montano, **per a defense witness**, put his hands up in the air and backed off when Petitioner pulled the gun and Eric was "real calm" (Vangie Aragon testimony, Vol. V, page 48) and Eric Montano said to Defendant "We're backing off." There is nothing that Defense counsel could add to change the color of this testimony since Eric Montano,

although he had been drinking, backed off, said so, put his hands in the air, but nevertheless ended up being shot by Defendant. A precise measurement of his alcoholic content becomes meaningless under the circumstances.

9. **Failure to Present Defense Witnesses**–Petitioner complains that his attorney should have presented the co-defendants and should have interviewed witnesses presented by his mother to defense counsel. All of the points raised by Defendant were presented through other defense witnesses. The Court has reviewed all of the defense witness testimony and the additional witnesses would have been repetitive and tactically it may be better to leave them off as witnesses as at least some were convicted felons.

10. **Refusal by counsel to Remove himself from the case**–by Petitioner's own statements this was brought to the Court's attention and a decision was made against Petitioner regarding his efforts to get rid of defense counsel. Petitioner has pointed to nothing that would have required the removal of defense counsel and this is a matter that was known and could have been brought as an issue on appeal.

11. **Prosecutorial Misconduct**–None of the statements made under this heading by Petitioner amount to "prosecutorial misconduct" and are full of speculation about what the police may have done and regarding negotiations with co-defendants. None of it is material for habeas corpus and the Court finds no merit in any of the arguments made.

12. **Use of the word "Pinto" at trial-(Deliberately Eliciting Prejudicial Material)**: Mr. Armendariz complains that the word "pinto" was used by a correctional officer at the bar and a fight leading to the shooting started then and Mr. Armendariz claims this was brought out through State's witness Jeff Medina. He complains that this was a to get around the Court's ruling that the State was not allowed to discuss "petitioner's old criminal record in a deal made to keep he victim's (Damacio Montano) domestic violence record out of the trial." See page 8 of Petition.

No such thing was elicited by the prosecution from witness Jeff Medina (Jeff Medina's testimony appears at Vol. II, pages 77-113). It was defense counsel, Troy Prichard, who on cross-examination of Medina first used the word "pinto" (Medina testimony, Vol. II, page 106). Jeff Medina denied that he even heard the term used the night of the shooting and only heard it where he worked at the penitentiary (Vol. II, page 106).

This point not only has no factual basis, but it is misleading.

ORDER

The court proposes to enter the foregoing decision and dismissing the Petition for Writ of Habeas Corpus summarily and with prejudice in granting the State's Motion to Dismiss. The parties are to be prepared to make corrections or additions to the proposed decision and Petitioner is to be prepared to argue why any of his allegations have any merit. The Court will allow a total of one hour, with Petitioner having the first forty-five minutes to make his presentation. The State will have the balance of the hour to respond.

THE PETITION FOR WRIT OF HABEAS CORPUS IS HEREBY DISMISSED, WITH PREJUDICE.

IT IS SO ORDERED.

Richard D. Rael

DISTRICT COURT

274

Filed
Supreme Court of New Mexico
11/19/2018 8:32 AM
Office of the Clerk
Joey D. Moya

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
November 19, 2018

NO. S-1-SC-37376

MICHAEL ARMENDARIZ,

Petitioner,

v.

STANLEY MOYA, Warden,

Respondent.

ORDER

WHEREAS, this matter came on for consideration by the Court upon petition for writ of certiorari filed under Rule 12-501 NMRA, and the Court having considered the petition and being sufficiently advised, Jusice Petra Jimenez Maes, Justice Charles W. Daniels, and Justice Barbara J. Vigil concurring;

NOW, THEREFORE, IT IS ORDERED that the petition for writ of certiorari is DENIED.

IT IS SO ORDERED.

WITNESS, the Honorable Judith K. Nakamura, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 19th day of November, 2018.

Joey D. Moya, Clerk of Court
Supreme Court of New Mexico

By Madeline Garcia
Chief Deputy Clerk

I CERTIFY AND ATTEST:
A true copy was served on all parties or their counsel of record on date filed.
Madeline Garcia
Clerk of the Supreme Court
of the State of New Mexico

Postmark
Nov 19

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

MICHAEL ARMENDARIZ,

Petitioner,

v. No. CV 18-1144 WJ/CG

STANLEY MOYA, et al.,

Respondents.

FINAL JUDGMENT

THE COURT, having issued an Order adopting the *Proposed Findings and Recommended Disposition* of Chief United States Magistrate Judge Carmen E. Garza, (Doc. 23), enters this Judgment in compliance with Rule 58 of the Federal Rules of Civil Procedure. Petitioner's *Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody*, (Doc. 1), is **GRANTED** as to Ground Twelve, and **DENIED** as to all other claims, and this case is **REMANDED** to state court to vacate Mr. Armendariz' conviction for aggravated battery. Additionally, pursuant to Rule 11 of the Rules Governing Section 2254 Proceedings for the United States District Courts, the Court **DENIES** a certificate of appealability.

IT IS SO ORDERED.

THE HONORABLE WILLIAM P. JOHNSON
CHIEF UNITED STATES DISTRICT JUDGE

(page 36 of 45)

FILED
United States Court of Appeals
Tenth Circuit

November 4, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MICHAEL ARMENDARIZ,

Petitioner - Appellee,

v.

MARIANNA VIGIL, Warden; STATE OF NEW MEXICO; HECTOR H. BALDERAS, Attorney General for the State of New Mexico;

Respondents - Appellants.

No. 19-2206
(D.C. No. 1:18-CV-01144-WJ-CG)
(D. N.M.)

ORDER AND JUDGMENT*

Before **PHILLIPS**, **BALDOCK**, and **CARSON**, Circuit Judges.

Petitioner-Appellee Michael Armendariz is an inmate serving a sentence of life imprisonment plus thirteen years in state prison in New Mexico. After exhausting his state-court remedies, he filed a petition under 28 U.S.C. § 2254, alleging entitlement to federal habeas relief on twelve different grounds. On recommendation of the magistrate judge, the district court denied relief on eleven of the asserted grounds but

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

granted relief on the twelfth. The state now appeals. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm.

BACKGROUND

Armendariz was found guilty of first-degree murder, attempted first-degree murder, aggravated battery, evidence tampering, and possession of a firearm by a felon. On direct appeal in state court, he argued his convictions for both aggravated battery (in violation of N.M. Stat. Ann. § 30-3-5 (1978)) and attempted first degree murder (in violation of N.M. Stat. Ann. §§ 30-28-1 (1978), 30-2-1 (1978)) violated the constitutional prohibition against double jeopardy because they arose out of the same conduct. The New Mexico Supreme Court rejected this argument in *State v. Armendariz*, 141 P.3d 526, 531–35 (N.M. 2006). Applying the "strict elements" test from *Blockburger v. United States*, 284 U.S. 299 (1932), the court concluded double jeopardy was not implicated by the multiple convictions because each offense included an element absent in the other. *Armendariz*, 141 P.3d at 533–35.

In 2013, however, the New Mexico Supreme Court overruled *Armendariz*, concluding that it had become "so unworkable as to be intolerable" in light of "modifications to double jeopardy jurisprudence" after *Armendariz*. *State v. Swick*, 279 P.3d 747, 754 (N.M. 2012). Those modifications brought New Mexico "more in line with United States Supreme Court precedent" so that "in the abstract, the application of *Blockburger* should not be so mechanical that it is enough for two statutes to have different elements." *Id.* The court concluded "the [New Mexico] Legislature did not intend multiple punishments for attempted murder and aggravated

battery arising from the same conduct because the latter is subsumed by the former," and so simultaneous convictions for both crimes arising from the same incident violate the prohibition on double jeopardy. *Id.*

After unsuccessfully pursuing state habeas relief, Armendariz filed a § 2254 petition in federal court in December 2018. A magistrate judge recommended his petition be granted as to the double jeopardy issue and that the aggravated battery conviction be vacated. The state objected, and the district court overruled those objections. This appeal follows.

DISCUSSION

"On appeal from the grant of habeas relief, we review the district court's factual findings for clear error and its legal conclusions de novo." *Richie v. Mullin*, 417 F.3d 1117, 1120 (10th Cir. 2005). To obtain relief under 28 U.S.C. § 2254(d)(1), the petitioner must demonstrate the state court adjudication of a claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The Fifth Amendment, applicable to the states via the Fourteenth Amendment, provides, in relevant part, that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Supreme Court has interpreted this clause to "prevent the sentencing court from prescribing greater punishment than the legislature intended," *Missouri v. Hunter*, 459 U.S. 359, 366 (1983), and to protect "against multiple criminal punishments for the same offense," *Monge v. California*, 524 U.S. 721, 728 (1998). When determining the degree of

punishment intended by a state legislature, this court is bound by the pronouncements of that state's highest court. *See Wood v. Milyard*, 721 F.3d 1190, 1197 (10th Cir. 2013) ("Under our precedent, we are bound by the state supreme court's determination of the state legislature's intent with respect to multiple punishments. We may not look behind it." (brackets, citation, and internal quotation marks omitted)).

Because, in *Swick*, the highest court of New Mexico determined the state legislature "did not intend multiple punishments for attempted murder and aggravated battery arising from the same conduct," 279 P.3d at 754, Armendariz's criminal convictions for both were "contrary to . . . clearly established Federal law," i.e., the Double Jeopardy Clause, *Blockburger*, *Hunter*, and *Monge*.[1] 28 U.S.C. § 2254. The district court therefore ordered that the conviction for the lesser offense be vacated. *See Wood*, 721 F.3d at 1197 ("Because vacating either . . . conviction will suffice to remedy [petitioner's] double jeopardy complaint, the most equitable result in this case would be one that permits the elimination of his lesser . . . conviction—or at least permits the [state] courts that tried him to choose which conviction will go.").

[1] It is inconsequential that, as a practical matter, vacating Armendariz's lesser conviction will not reduce his term of imprisonment because he was still sentenced to life. *See Wood*, 721 F.3d at 1195–96. ("Double jeopardy doctrine prohibits cumulative *punishments* the legislature hasn't authorized. And it's long since settled that a conviction, even a conviction without a corresponding sentence, amounts to a *punishment* for purposes of federal double jeopardy analysis.")

The state challenges this conclusion on two bases. First, it contends the district court misapplied § 2254 by considering *Swick*, rather than confining its analysis to review of the New Mexico Supreme Court decision in *Armendariz*. Second, it contends the district court improperly decided that *Swick* was retroactive, instead of leaving that matter to the New Mexico courts. We are not persuaded.[2]

Regarding the first argument, we agree with the district court that the relevant corpus of "clearly established federal law" was not changed between *Armendariz* in 2006 and *Swick* in 2012. Rather, "both decisions applied *Blockburger*." Aplt. App. at 308. The *Swick* court, however, revisited its prior conclusions regarding the intent of the New Mexico legislature. The district court was not precluded by § 2254(d)(1) from considering the pronouncements of the state's highest court on this issue. To the contrary, it was bound by them. *See Wood*, 721 F.3d at 1195 ("[A] conclusion about state legislative policy, coming . . . from the state high court, binds us."); *Birr v. Shillinger*, 894 F.2d 1160, 1161 (10th Cir. 1990) (per curiam) ("In assessing whether a state legislature intended to prescribe cumulative punishments for a single criminal incident, we are bound by a state court's determination of the legislature's intent.").

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[2] We do not consider whether Armendariz exhausted his available state court remedies as a pre-requisite to relief under § 2254 on his double jeopardy claim because the state expressly waived exhaustion as a defense in its response to his petition. Aplt. App. at 78 (listing double jeopardy claim as one which "Mr. Armendariz appears to have exhausted available state-court remedies . . . by presenting them to the state's highest court in the course of direct appeal and post-conviction proceedings" (footnote omitted)). *See Gonzales v. McKune*, 279 F.3d 922, 926 (10th Cir. 2002) (recognizing that state can waive exhaustion requirement in answer to habeas petition).

Regarding the second argument, the district court concluded the state waived the issue of *Swick*'s retroactivity by not raising it until its response and objections to the magistrate's recommendations. *See United States v. Garfinkle*, 261 F.3d 1030, 1031 (10th Cir. 2001) ("In this circuit, theories raised for the first time in objections to the magistrate judge's report are deemed waived."). We agree. The state contends it had no reason to raise the issue of retroactivity until after the issuance of the magistrate's recommendations, but this assertion is belied by the record. The state did discuss *Armendariz* and *Swick* in its response to the petition, and the magistrate's recommendations include no discussion of retroactivity whatsoever. Had the state wished to timely raise the issue, it could have. No sound reason exists to depart from the usual waiver rules in this context, and we decline to do so.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

Entered for the Court

Joel M. Carson III
Circuit Judge

Allan Crawford – Fuzion Video Production

1336 Wyoming Blvd NE • Albuquerque, NM • (505)239-5898 • allan.crawford@comcast.net

Education

Eastern New Mexico University

B.S. in Broadcast Production

- **Video Technician**, Studies in various production methods and mediums. Extensive training with technical aspects of different film, video and electronic media. Working knowledge of acquisition and production methods using these various types of media.

Technology Summary

Over ten years experience working with a large variety of production techniques involving a wide range of recording equipment from video tape recorders to digital media management. Software for editing and enhancing various types of media to deliver many types of product from still frame images for analysis, to sophisticated programs for training, education, re-creation and other purposes.

Experience

KENW-TV (1997 to 2001)

- Handled various technical aspects in the broadcast arena from field and studio production techniques, to editing and delivering to a variety of media.

Fuzion Video Production (2002 to Present)

- We have handled video and film of all types for many years. From basic transfers and repairs, to more thorough examinations and evaluations for private, corporate and legal fields. Image and audio clean up or enhancements, as well as expert advice and evaluations. Re-creations for crime scene analysis, and advice on many different aspects involving video with law firms across New Mexico as well as various National programs such as America's Most Wanted.

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EXHIBIT 2

Register, North, etc. The same point in time could not exist on a separate portion of the tape on the original video.

- The contents of both the "certified copy of the trial video" and the purported "original video" appear to have been made from the same or similar master source which would **not be the original.** The "certified copy of the trial video", does not have as good quality image as the purported "original video".

- The security system used in the Two Minute Warning uses a multiplex recording method. This means that each camera in the system is recorded in intervals. A still image of a point in time is recorded from each camera, one after the other. If an original tape from this system was played on a standard Video Cassette Recorder, one would see a series of flashing images from every camera angle over time. The video would not show a continuous image from any one angle without playing on the proper equipment. There should be a consistent interval of frames for every camera. If the system records one frame every second, then there would be a time stamp that skips one second evenly over the entire time span. In the purported original video, there are several variations to the time missing for each camera. The missing time intervals of recorded frames, is inconsistent and could only be achieved by improper playback equipment and/or by manipulation of the video in a digital editing environment. (Exhibit 28)

I reviewed the interview of Lynn Russell, Manager of TAS Security Systems, Inc., 2712 Carlisle Boulevard, NE, Albuquerque, New Mexico 87110, who installed the security system at the Two Minute Warning Sports Bar by Expert Witness Jack D. Blair, on June 19, 2009. Mr. Russell explained in that interview that the processor digitized images and sent sequential snap-shot images, rather than moving video images, from the cameras to the time-lapse VCR. If only one camera was replayed on the VCR it was similar to a moving video image. However, because of the numbers of cameras, the replay was more like sequential, snap-shot images.

If the original video tape was tampered with or spliced, it would leave a blank spot and would be obvious. Each frame is sequentially numbered, with a time and date on each frame. If a frame is deleted, the frame number will not appear. (Exhibit 25)

- I concluded that there are variations in the starting and ending time stamps between the camera feeds. Because an original recording would be placing the same time reference to each camera feed, one should expect all the recordings to have the same time stamp at both the start and end of each individual camera angle.

- ***The original video system was a, multiplex surveillance system, with a 16-camera capability, but set up as an eight-camera, record configuration.***

Habeas Corpus Review
by
Allan Crawford

I, Allan Crawford, was retained by the Jay R. Mueller Law Firm in February, 2010. I am a Video Technician and employee of Fuzion Video Production. I was retained as a Video Expert, for the purposes of reviewing and evaluating videos, entered as evidence and at trial as a State Exhibit re: State v. Armendariz.

I was requested to review a video used at trial and purported to be a an exact copy of an original security video taken from the Two Minute Warning Sports Bar, Los Lunas, New Mexico and determine if that video used at trial was an exact copy or had been tampered with, manipulated, changed or deleted.

I conferred with Expert Witness Jack D. Blair and reviewed his report. Mr. Blair refers to trial testimonies by Agent Shane Arthur, New Mexico State Police and Lead Detective Charles Nuanes, Los Lunas Police Department that a single original security video was taken from Charles Apodaca, owner of The Two Minute Warning Sports Bar. (Exhibit 8)

On March 25, 2010, Mr. Blair and I traveled to the Valencia County District Court House, Los Lunas, New Mexico. Phillip Romero, Lead Supervisor, Valencia County District Court House, furnished the video, used in the trial of Petitioner. I used a Mitsubishi HS-U448 Precision Turbo Drive 4 Head VHS Recorder; Panasonic AG-2560 Super Drive 6 Head VHS Recorder; and Panasonic DMR-ES10 DVD Recorder to make one copy of the video, which I certified.

On April 8, 2010, Mr Blair, Attorney Jay Mueller, Executive Assistant Marymargaret Ricci, Research Assistant Eddie Collazo, Special Prosecutor Michael Martinez and I traveled to the Los Lunas Police Department, Los Lunas, New Mexico. Joe Sanchez, Captain and Evidence Custodian Supervisor, furnished what was listed in the Los Lunas Police Department investigation case file, as the "original video" taken from the security system at the Two Minute Warning Sports Bar, October 6, 2002. Using (equipment), I made one copy of the video, which I certified.

After examining the "certified trial video copy" and the purported "original video", I concluded the following.

- ***Neither is an original video.***
- ***Both videos are copies.***
- ***Neither video is a copy made directly from an original video.*** The purported original video is not a multiplex recording. I can see a sequence of images from each camera isolated and separate from the other cameras. There is an entire portion of the incident for every camera; camera 16, then Front Door, East

EXHIBIT 3

- ***All eight, separate cameras have identical time stamps of date and military time. The time stamp across all eight cameras is set at 20 hours military time on Sunday. The correct time stamp should read 01 hours military time on Sunday.***

- I know that ***only one original video existed,*** because I conferred with Expert Witness Blair and reviewed his Expert Witness Report, which details the trial testimony of Agent Shane Arthur, New Mexico State Police and Lead Detective Charles Nuanes, Los Lunas Police Department. Both witnesses stated that there was *only one original video* furnished by owner Charles Apodaca, from the security system at the Two Minute Warning Sports Bar. (Exhibit 8)

I also reviewed recordings of the audio/video (Dash-Cam) systems from the Los Lunas Police Department vehicles driven by Officers Paul Gomez and Vince Torres, during the early morning hours of October 6, 2002. Officer Gomez was driving Unit #21 and Officer Torrez was driving Unit #19.

- I concluded that there is a portion of time missing in the recording of the Dash-Cam from Unit #19. The Dash-Cam recording is continuous until it reaches the time stamp 01:28:16. At that time, the video jumps ahead 49 seconds to the time stamp 01:29:05. ***It appears that the Dash-Cam was manipulated, to delete the 49 seconds. This coincides with the point in time that Unit #19 is turning the corner in front of the Two Minute Warning and driving eastward on Valencia Road.***

Allan Crawford

7-16-10
Date:

No. _____

In The
SUPREME COURT OF THE UNITED STATES

MICHAEL ARMENDARIZ *pro se (*by DIANA CROWSON)

v.

MARIANNA VIGIL, Warden; STATE OF NEW MEXICO;
HECTOR H. BALDERAS, Attorney General for the State of New Mexico

Petitioner Michael Armendariz requests a sixty day extension of time to file his Petition for Writ of Certiorari until April 4th, 2021. The final judgment of the 10th Circuit Court of Appeals was entered on November 4th, 2020. The date for filing the Petition for Certiorari will expire on February 4th, 2021. This application is being filed on January 25th, 2021, ten days before the filing expiration due date.

The petitioner would have been able to file the Petition before it was due except he has been quarantined as he has been very ill with COVID 19 and hasn't had access to mail or research. He isn't allowed to receive or send mail, but was finally able to call me (Diana Crowson, mother of petitioner) for the first time in several days. He asked me if I would file this request for extension of time for him since he isn't able to do this for himself and I have Power of Attorney for him.

I am not familiar with legal procedures and not sure how to make this request so I beg your forgiveness for any errors. Michael Armendariz, Petitioner prays that his application for extension of time until April 4th, 2021 to file his petition for the writ of certiorari be granted.

Respectfully submitted,

Michael Armendariz by L. D. Crowson

Diana Crowson for Michael Armendariz, Petitioner

(ORDER LIST: 589 U.S.)

THURSDAY, MARCH 19, 2020

ORDER

In light of the ongoing public health concerns relating to COVID-19, the following shall apply to cases prior to a ruling on a petition for a writ of certiorari:

IT IS ORDERED that the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. See Rules 13.1 and 13.3.

IT IS FURTHER ORDERED that motions for extensions of time pursuant to Rule 30.4 will ordinarily be granted by the Clerk as a matter of course if the grounds for the application are difficulties relating to COVID-19 and if the length of the extension requested is reasonable under the circumstances. Such motions should indicate whether the opposing party has an objection.

IT IS FURTHER ORDERED that, notwithstanding Rules 15.5 and 15.6, the Clerk will entertain motions to delay distribution of a petition for writ of certiorari where the grounds for the motion are that the petitioner needs additional time to file a reply due to difficulties relating to COVID-19. Such motions will ordinarily be granted by the Clerk as a matter of course if the length of the extension requested is reasonable under the circumstances and if the motion is actually received by the Clerk at least two days prior to the relevant distribution date. Such motions should indicate whether the opposing party has an objection.

IT IS FURTHER ORDERED that these modifications to the Court's Rules and practices do not apply to cases in which certiorari has been granted or a direct appeal or original action has been set for argument.

These modifications will remain in effect until further order of the Court.